

## 48A C.J.S. Judges § 360

Corpus Juris Secundum | August 2023 Update

### Judges

Joseph Bassano, J.D.; Khara Singer-Mack, J.D.; Thomas Muskus, J.D.; Karl Oakes, J.D. and Jeffrey J. Shampo, J.D.

### X. Special or Substitute Judges and Like Judicial Officers


#### B. Selection and Appointment of Special or Substitute Judges

#### 2. Selection and Appointment Procedures of Special or Substitute Judges

## § 360. Special or substitute judge selected by agreement of parties

[Topic Summary](#) | [References](#) | [Correlation Table](#)

### West's Key Number Digest

West's Key Number Digest, [Judges](#)  16(.5), 16(1)

**Unless authorized by law, the litigants to an action have no right to select a special judge by agreement.**

Party litigants have no authority to select special or like judges by agreement<sup>1</sup> unless such authority is conferred by law.<sup>2</sup> When the right of the parties to select the special judge is conferred by the constitution, it cannot be limited by statute.<sup>3</sup> When a procedural rule provides for the appointment of a special judge upon the recusal of the regular judge, the selection of a special judge by an agreement of the parties is improper.<sup>4</sup>

No particular form or method is necessary by which an agreement for a special judge shall be made,<sup>5</sup> unless a particular form or method is prescribed by law,<sup>6</sup> and an agreement for a special judge is not rendered insufficient merely because it is not signed by a party in person<sup>7</sup> or because it bears no date.<sup>8</sup> Under some provisions of law, it is essential to a valid agreement that there be mutuality of consent<sup>9</sup> and that the selection be approved by the regular judge.<sup>10</sup> The agreement selecting the special judge need not be in writing,<sup>11</sup> unless a written agreement is required by law,<sup>12</sup> and even when such a requirement applies, a failure to comply does not necessarily deprive the judge of jurisdiction.<sup>13</sup> Where the parties may validly stipulate to a temporary judge, absent a valid stipulation by the litigants, a temporary judge has no jurisdiction to act, and any actions purportedly taken are therefore void.<sup>14</sup>

Generally, such an agreement must be joined in by all parties to the suit,<sup>15</sup> but the parties who appear and take part in litigation may stipulate to the appointment of a temporary judge without the consent of absent, nonlitigating parties.<sup>16</sup> Persons not parties to the agreement, who do not appear and participate in the proceedings, are not bound by the acts of the special judge.<sup>17</sup>

***Implied acceptance of temporary judge.***

A stipulation to trial before a judge pro tem need neither be in writing nor expressly stated but may be implied from the conduct of the parties for purposes of a constitutional provision authorizing such stipulations.<sup>18</sup>

***Failure to agree.***

Under some provisions, on the failure of the parties to agree, it is the duty of the judge before whom the cause is pending to nominate a certain number of competent persons from whom a special judge may be selected;<sup>19</sup> or the regular judge must certify his or her disqualification to the governor, who will appoint the special judge;<sup>20</sup> or the clerk of court must certify the fact of disagreement to the clerk of the supreme court, who shall nominate certain persons from whom a special judge may be selected;<sup>21</sup> or the regular judge may be authorized to transfer the case to another judge.<sup>22</sup>

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Footnotes

- 1 Ark.—*Abercrombie v. Green*, 235 Ark. 776, 362 S.W.2d 12 (1962).
- 2 Utah—*State v. McGee*, 24 Utah 2d 396, 473 P.2d 388 (1970).  
Wash.—*State v. McNairy*, 20 Wash. App. 438, 580 P.2d 650 (Div. 3 1978).  
**Appointment of temporary judge by stipulation**  
Cal.—*Gridley v. Gridley*, 166 Cal. App. 4th 1562, 83 Cal. Rptr. 3d 715 (1st Dist. 2008).
- 3 Tex.—*Reynolds v. City of Alice*, 150 S.W.2d 455 (Tex. Civ. App. El Paso 1940).
- 4 Tex.—*Leininger v. State*, 674 S.W.2d 868 (Tex. App. Corpus Christi 1984), petition for discretionary review refused, (Mar. 20, 1985).
- 5 Okla.—*Ex parte Elgan*, 1912 OK CR 381, 8 Okla. Crim. 75, 126 P. 584 (1912).
- 6 W. Va.—*Meadow River Lumber Co. v. Smith*, 121 W. Va. 14, 1 S.E.2d 169 (1939).
- 7 Tex.—*Cooper v. State*, 323 S.W.2d 949 (Tex. Crim. App. 1959).
- 8 Tex.—*Cooper v. State*, 323 S.W.2d 949 (Tex. Crim. App. 1959).
- 9 Tex.—*Mims v. State*, 112 Tex. Crim. 176, 15 S.W.2d 628 (1929).
- 10 Mo.—*Ex parte Fish*, 184 S.W. 479 (Mo. Ct. App. 1916).
- 11 Tex.—*Grogan v. Robinson*, 8 S.W.2d 571 (Tex. Civ. App. Dallas 1928), writ refused, (Jan. 30, 1929).
- 12 W. Va.—*Meadow River Lumber Co. v. Smith*, 121 W. Va. 14, 1 S.E.2d 169 (1939).
- 13 Cal.—*Gridley v. Gridley*, 166 Cal. App. 4th 1562, 83 Cal. Rptr. 3d 715 (1st Dist. 2008).

- 14 Cal.—*Del Real v. City of Riverside*, 95 Cal. App. 4th 761, 115 Cal. Rptr. 2d 705 (4th Dist. 2002).
- 15 Tex.—*State v. Gutschke*, 233 S.W.2d 441 (Tex. Civ. App. San Antonio 1950), judgment rev'd on other grounds, 149 Tex. 292, 233 S.W.2d 446 (1950).
- 16 Cal.—*Reisman v. Shahverdian*, 153 Cal. App. 3d 1074, 201 Cal. Rptr. 194 (2d Dist. 1984).
- Default**  
One whose default has been duly entered is not a "party litigant" whose stipulation is required.
- Cal.—*Barfield v. Superior Court for Los Angeles County*, 216 Cal. App. 2d 476, 31 Cal. Rptr. 30 (2d Dist. 1963).
- 17 Cal.—*Toby v. Superior Court in and for Los Angeles County*, 8 Cal. App. 2d 32, 47 P.2d 338 (2d Dist. 1935).
- W. Va.—*Brown v. Miller*, 103 W. Va. 282, 137 S.E. 227 (1927).
- Nonappearing heirs, legatees, and creditors**  
Cal.—*In re Kent's Estate*, 6 Cal. 2d 154, 57 P.2d 901 (1936).
- 18 Cal.—*Gridley v. Gridley*, 166 Cal. App. 4th 1562, 83 Cal. Rptr. 3d 715 (1st Dist. 2008).
- 19 Ind.—*Weer v. State*, 219 Ind. 217, 36 N.E.2d 787 (1941).
- 20 Tex.—*Clements v. Fort Worth & D.S.P. Ry. Co.*, 7 S.W.2d 895 (Tex. Civ. App. Amarillo 1928) (disapproved of on other grounds by, *Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172 (Tex. 2004)).
- 21 Ind.—*State ex rel. Gentry v. O'Byrne*, 221 Ind. 282, 46 N.E.2d 687 (1943).
- 22 Mo.—*State v. De Shon*, 334 Mo. 862, 68 S.W.2d 805 (1934) (overruled in part on other grounds by, *State v. Williams*, 337 Mo. 884, 87 S.W.2d 175, 100 A.L.R. 1503 (1935)).